Speculum Juris

Vol 34 No 2 (2020)
Published 29 January 2021

ISSN 2523-2177

University of Fort Hare
Together in Excellence

Cite as: Okpaluba and Abioye "Consultation as the Hallmark of South Africa's Participatory Democracy: Lessons from the Courts" 2020 (34) Spec Juris 130

Consultation as the Hallmark of South Africa's Participatory Democracy: Lessons from the Courts

Chuks Okpaluba*
Adjunct Professor, Nelson Mandela School of Law, University of Fort Hare

Funmi Abioye**
Associate Professor, College of Law, University of South Africa

Abstract

In the absence of previous usage or precedents, but taking nothing for granted, the founders of the Constitution of the Republic of South Africa, 1996 incorporated in several of its provisions a litany of constitutional values to guide the emerging political leadership at the coming of democratic constitutionalism and the rule of law in the new democratic State. Along with accountability, responsiveness and openness, some of the founding values of section 1 of the 1996 Constitution, there are the value-like imperatives of consultation and participation, in the legislative law-making and the executive decision-making processes, which are given the pride of place in the democratic brand, which the founders of the Constitution sought to promote. The fact that the Constitution is silent on the meaning of these terms means that the responsibility falls on the courts, especially the Constitutional Court, to give meaning to these expressions. In the process, and through the cases that have come before it, the higher courts have, in the last 25 years, delivered abundant lessons to educate the students of democratic constitutionalism, constitutional law and politics. This has helped to enhance the understanding of consultation, participation and public involvement, and to ascertain whether actions carried out are according to the constitutional script. The present discussion concentrates on the constitutional imperative of consultation and the role it has played in the development of South Africa's participatory democracy.

---

* LLB LLM (London), PhD (West Indies).

** LLB (Lagos), LLM LLD (Pretoria). Much appreciation for the research grant of the College of Law, UNISA which made my contribution to this research possible.

1 INTRODUCTION

Consultation in the process of law making or policy formulation is important, as it serves a myriad of purposes, three of which stand out as the main objectives. First, it helps the citizen or community to understand how a law or policy might affect them when enacted or implemented. Second, it helps the government – national, provincial or municipal – to get to know the views, any ideas or suggestions that the citizen or community may have for or against the proposed law or policy. Third, there can be no doubt that the views, inputs and critical suggestions of the citizen or community would help government to improve its ideas and shape its work in order to make laws and policies more effective.[1] Furthermore, consultation demonstrates the legitimacy of public decision-making, and it is one of the public participatory mechanisms mandated in the Constitution as a means of building trust with affected parties or the citizenry, and in furtherance of the rule of law.[2] This interrelation between consultation as a key component of public participation, and the rule of law is important to note. Thus, in laying down the principles of co-operative government and intergovernmental relations, section 41(1)*(h)*(iii) mandates that consultations must take place between the spheres of government and organs of State.[3] Other sections in the Constitution espouse the idea of consultation without expressly mentioning the term, thus highlighting the importance of consultation to the democratic process.[4] Added to these are the myriad of legislative documents that stipulate a consultative component in the law-making process. Consultation can thus be viewed as one of the mechanisms to "ensure that the needs and aspirations of the people are taken into consideration during policy making and law making processes"[5], in order to achieve public participation in ensuring the constitutional values in section 1(*d*) of the Constitution are met.

It is important to note that consultation, rule of law and participatory democracy are just some of the constitutional "values" upon which the South African Constitution functions; consultation in itself being more of a constitutional imperative, a directive of what is required by the constitution in its bid to ensure that the requirements for a democratic society are met. These constitutional values (and imperatives) are interwoven and interconnected, and as seen from the various enunciations of the courts, in particular, the Constitutional Court, they are essential for the survival of South Africa's constitutional democracy. Langa J observed that "the primary role of the courts is one of safeguarding the rule of law and the supremacy of the constitution."[6] Thus, the actions of the courts in carrying out their mandate as the judicial arm of government are informed by the mandate to safeguard the rule of law and the Constitution.

"Consultation" applies to all levels and types of decision-making or policy formulation, whether of a legislative or executive nature; and whether at the national, provincial or local government levels. The South African Constitution makes it pertinent that in any form of decision-making or policy formulation, adequate and deliberate consultations and by extension, public participation must have been conducted in order for such decision or policy to pass the test of legality and rationality. This contribution seeks to tease out the content and application of this constitutional imperative in practice in relation to the role of the executive arm of government in decision-making and policy formulation, and to highlight the emphasis the courts have placed on the imperative of adopting the right consultative mechanisms in such processes. This is done by focusing on selected jurisprudence of the courts, especially the Constitutional Court, in this regard.

This article commences with an examination of the constitutional imperative of consultation, the general meaning ascribed to that term, and the ways in which it has been, and can be implemented in the South African State as seen from court decisions and the rationale behind these decisions. In this presentation, attention is paid to the decisions of the higher courts, and in particular, to the Constitutional Court, relating to the issues involving consultation

1 See also "Consultations/GOV.WALES at https://consultations.gov.wales.

2 Section 1, 1996 Constitution; Masango "Public Participation: A Critical Ingredient of Good Governance" 2002 *Politeia* 54, where the author acknowledges that public participation in decision-making is a must for a democratic government.

3 "All spheres of government and all organs of state within each sphere must co-operate with one another by informing one another of, and consulting one another on, matters of common interest."

4 See s 59(1)*(a)*, 72(1)*(a)* and 118(1)*(a)* for example.

5 Masango *Politeia* 54.

6 Langa "'A Delicate Balance': The Place of the Judiciary in a Constitutional Democracy" 2006 *SAJHR* 2 5 which paper was part of the proceedings of a symposium to mark the retirement of Arthur Chaskalson, the former Chief Justice of the Republic of South Africa.

and participation at the Executive decision-making, policy formulation, and the law-making processes at the Provincial and Local Government levels of Government. The article further looks at how the courts have sought to elucidate and interpret the content, meaning and application of this imperative. Due to the enormous wealth of case law available on the subject and the inevitable space constraints of this article, consultation at the National Executive decision-making and policy formulation and the law-making processes at the National Assembly level are omitted from this discussion. Focus is placed on a sample of cases that are believed to have assisted in developing the jurisprudence in relation to our understanding and application of this constitutional imperative.

In order to further clearly understand the implication of the term "consultation" and what that term means outside the South African constitutional jurisprudence, the existence and viability of the duty to consult in other common-law jurisdictions, such as the English and Canadian developments are also discussed herein. This is in a bid to verify the manner in which such duty has been interpreted in these established democratic jurisdictions, and to signify the importance of the duty to consult in any democratic structure, governed by the rule of law and democracy.

In considering the prominent role of consultation in executive policy formulation, the Chief Justice of South Africa addressed the rationale behind the consultative process in the case of *Electronic Media Network Ltd v e.tv (Pty) Ltd*.[7] Mogoeng CJ had said that:

> Consultation, as distinct from negotiations geared at reaching an agreement, is not a consensus-seeking exercise. Within the context of national policy development, it must mean that a genuine effort is being made to obtain views of industry or sector role-players and the public. In other words, a genuine and objectively satisfactory effort must be made to create a platform for the solicitation of views that would enable a policymaker to appreciate what those being consulted think or make of the major and incidental aspects of the issue or policy under consideration. People or entities must be left to express themselves freely on as wide a range of issues, pertinent to a policy proposal, as possible. The standpoints of interested parties, who want to have their views taken into account, must thus be allowed to reach a policymaker. But consultation fulfils a role that is fundamentally different from negotiation.[8]

In addition to the foregoing, consultation, particularly in relation to national policy development, "is not an inconsequential process or a sheer formality"; rather, it exists "to facilitate a festival of ideas that would hopefully provide some enlightenment on the stakeholders' major perspectives so that policy-formulation is as informed as possible" [9] for the good of the society as a whole.

2 THE MEANING OF CONSULTATION

Before proceeding with the discussion of the jurisprudence developed by the Constitutional Court in respect of this important constitutional imperative, it is vital to; first and foremost, find out the ordinary meaning of the term: "consultation" within the context in which it is used in this discussion. It thus seems that the place to begin is to look at what the *2020 Dictionary.com's Thesaurus* and *Black's Law Dictionary* say it means. In the *Thesaurus,* "consultation" means: "discussion, talk, session, conference, meeting, sounding, soundings" whereas in that leading law dictionary, "consultation" is defined as: an "act of consulting or conferring: e.g. patient with doctor; client with lawyer. Deliberation of persons on some subject. A conference between the counsel engaged in a case, to discuss its questions or arrange the method of conducting it."[10] From these sources, it is clear that "consultation" as discussed in this context, is about discussions, talks, conferences, sounding of opinions, and deliberations between the public authority and members of the public or organisations, groups or community in respect of the policy or decision which the public authority or functionary is engaged in taking or about to take that will have an adverse effect on the interests of the persons or groups concerned.

Consultation as an imperative and in practise, when properly effected, is important because it improves the quality of rules and programmes and also improves compliance and reduces enforcement costs for both governments and citizens subject to rules.[11] The Organisation for

7 2017 ZACC 17 (8 June 2017); 2017 (9) BCLR 1108 (CC).
8 *Electronic Media Network Ltd* para 37.
9 *Electronic Media Network Ltd* para 38.
10 *Black's Law Dictionary* (6 ed) 316; *2020 Dictionary.com Thesaurus (Online).*
11 Organisation for Economic Co-operation and Development (OECD) "Background Document on Public

Economic Co-operation and Development (OECD) has indicated the various ways in which public consultations are beneficial to governments and in governance. Of particular interest amongst these is the fact that consultation increases the level of transparency and regulatory quality by ensuring that the views of experts, different perspectives and ideas are considered in the process of executive policy formulation before a decision is made.[12] The OECD also notes that consultation processes, when properly conducted, can enhance voluntary compliance due to the fact that people are forewarned of what is coming, and also, more importantly, because consultation gives rise to a sense of legitimacy and shared ownership that motivate parties to comply.[13] This undoubtedly enhances the rule of law. The fact that consultation is able to give rise to voluntary compliance because it legitimises law-making, as people are able to identify with the rules/laws borne out of such consultative processes. Thus public involvement, in the form of consultations, in law and policy-making and implementation, makes a positive contribution to government legitimacy and by extension, the rule of law.[14] Ensuring consultation produces social capital through the creation of understanding and trust within society.[15]

In *Maledu v Itereleng Bakgatla Mineral Resources*[16], the Constitutional Court emphasized the purpose and importance of the consultation requirement in an enabling Act. The Court, referring to the *Bengwenyama Minerals* case,[17] highlighted the fact that consultation is necessary when the rights and interests of people are likely to be impacted by the proposed law, policy or administrative action.[18] And as such, the law makes it mandatory (through an enabling Act) in many instances that consultations should take place with the groups of people that will potentially be affected by such law, policy or administrative action in order to "see whether some accommodation is possible."[19] This indicates that the views of the interested parties are sought and considered. Thus, as noted in the *Benwenyama Minerals* case, merely informing or notifying of a pending course of action or position, cannot be equated to consultation.[20]

2 1 "Consultation" as Seen from the Point of View of Adjudication

As indicated above, the courts have over the years given insight into the meaning of consultation. The application to review the Director General's (DG) decision to close the Cape Town Refugee Reception Office (RRO) in *Scalabrini Centre v Minister of Home Affairs,*[21] involved a three-pronged investigation with associated questions. First, was there a failure to consult the Standing Committee on Refugee Affairs (SCRA), which implicates section 8(1) of the Refugee Act 130 of 1998? Second, was there a failure to consult affected persons? Third, whether the decision was irrational, unreasonable and based on irrelevant considerations? Before setting out to answer these questions, the court had to tackle the preliminary question as to whether the decision in contention was an administrative action under the Promotion of Administrative Justice Act 3 of 2000 (PAJA), specifically, whether it adversely affected any rights. To this question, the court held that the decision affected an asylum seeker's right to apply for asylum at any Refugee Reception Office in terms of section 21 of the Refugee Act. This is because, before the decision in question, there were four offices and afterwards three – a diminishment of the content of the right and an adverse effect for the purposes of PAJA.[22]

In order to answer the consultation questions raised in this case, Rodgers J had to address the meaning of "consultation" and cutely broke the subject down to two interrelated points.[23] At the first, substantive level, consultation entails "a genuine invitation to give advice and a

Consultation" available at https://www.oecd.org/mena/governance/36785341.pdf (accessed 11-01-2019) 1.

12 OECD 2.

13 OECD 2.

14 Masango *Politeia* 55.

15 Dr Abedian, speaking at the Helen Suzman Foundation roundtable on "Consultation and the Constitution" available at https://hsf.org.za/publications/roundtable-series/issue-thirty-one-october-2014-consultation-and-the-constitution (accessed 20-10-2020).

16 2019 (2) SA 1 (CC); 2018 ZACC 41 (25 October 2018) paras 78–80.

17 *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 4 SA 113 (CC) para 63.

18 *Maledu* para 78.

19 *Maledu* para 79.

20 *Benwenyama Minerals* para 68.

21 2013 3 SA 531 (WCC).

22 *Scalabrini Centre* paras 63–64.

23 *Scalabrini Centre* para 72.

genuine receipt of that advice."[24] Consultation would usually be understood as a meeting or conference at which discussions take place, ideas are exchanged and advice or guidance is sought and tendered. The parties or their representatives could be physically present at such meeting or conference but the modern means of communication if chosen by the parties, or, if circumstances so dictate, will suffice.[25] As long as the lines of communication are open and the parties are afforded a reasonable opportunity to put their cases or points of view to one another, the form of consultation will usually not be of great import.[26] Consultation is not to be treated perfunctorily or as a mere formality.[27] This means, *inter alia*, that engagement after the decision-maker has already reached his decision or once his mind has already become "unduly fixed" is not compatible with true consultation.[28] At the second, procedural level:

> Consultation may be conducted in any appropriate way determined by the decision-maker, unless a procedure is laid down in the legislation. However, the procedure must be one which enables consultation in the substantive sense to occur. This means that sufficient information must be supplied to the consulted party to enable it to tender helpful advice; sufficient time must be given to the consulted party to enable it to provide such advice; and sufficient time must be available to allow the advice to be considered.[29]

2 2 The Judgment of Rodgers J in *Scalabrini*

In answering the question whether the DG had consulted the SCRA as required by section 8(1) of the Refugees Act, Rogers J concluded that he had not, hence the decision was set aside under subsections 6(2)*(f)*(i) or 6(2)(i) of PAJA, or under the general legality principle.[30] The question was whether the DG had complied with the requirements of procedural fairness in accordance with the provisions of section 4 of PAJA? In the first place, where new asylum seekers were a group or class of the public whose rights were adversely affected by the administrative action, and where accordingly, the DG had to give effect to the right to procedurally fair administrative action, such action had to follow one or more of the procedures laid down in section 4 of PAJA. This raised the question whether it was possible to comply with section 4(1), given that the affected persons were an unidentifiable group who were not inside South Africa – the closure decision having become effective at the end of June 2012 and would have affected people arriving in or after that date and it would not have been possible to hear them prior to that date. It was held that section 4 required public-interest groups and individuals to be heard on a proposed action, even where the affected persons were unable to provide input and were not yet identifiable. In this regard, section 4(2) did not restrict a public inquiry to hearing affected individuals or their agents, and section 4(3) allowed for obtaining comment from individuals not affected by the action. Furthermore, section 4(4)*(a)* allowed a departure from subsections 4(4)(1)-(3) if it were reasonable and justifiable to do so[31] – such a departure could only be as great as was justified by the circumstances, and procedural fairness could not be thrown aside entirely. Here, assuming a public inquiry in terms of section 4(2) or notice and comment procedure under section 4(3) were not feasible, the DG ought not to have sought comment from the organisations which would have participated in a public inquiry.[32] Given that the actual engagement was procedurally unfair, the decision could be set aside under section 6(2)*(c)*.[33]

24 *R v Secretary of State for Social Services, Ex parte, Association of Metropolitan Authorities* [1986] 1 All ER 164 at 167*g-h*; *Hayes v Minister of Housing, Planning and Administration, WC* 1999 4 SA 1229 (C) 1242C-F.
25 Per Van Zyl J, *Hayes* 1242H-I.
26 *Hayes* 1242J–1243A.
27 *Port Louis Corporation v Attorney General of Mauritius* [1965] AC 1111 (PC) 1124*d-f*.
28 *Sinfield v London Transport Executive* [1970] 2 All ER 264 (CA) at 269*c-e*.
29 *Scalabrini Centre* para 72; *Association of Metropolitan Authorities* 167*h-j*; *Hayes* 1242C–1243B.
30 *Scalabrini Centre* paras 70 and 79.
31 *Scalabrini Centre* paras 81–82.
32 *Scalabrini Centre* paras 85–88.
33 *Scalabrini Centre* para 90.

Turning to the issue of whether the legality principle required the DG to consult the public before making the closure decision, the Court held that the principle required the means, that is, the process and decision, to rationally relate to the end for which the power was given. Here, the end was to ensure that there were as many offices as necessary for the purposes of the Refugees Act. The question to ask then is, was the DG's process rationally related to that end? Section 8(1) of the Refugees Act expressly required consultation with the SCRA to achieve the purpose, but even more needed to be done: the DG had to get the views of organisations representing asylum seekers. He did not, and the decision was therefore unlawful.[34] The Court held that the decision was not only reviewable on the grounds in subsections 6(2)*(e)*(iii), 6(2)*(f)* (ii), and 6(2)*(h)* of PAJA, and given the reasons for the decision,[35] it was reviewable under the legality principle: the decision and the purpose of section 8(1) were not rationally related; and the DG had failed to apply his mind properly.[36] This decision was further reinforced by the Supreme Court of Appeal in setting aside the decision to close the Refugee office for being substantively irrational and unlawful.[37]

2 3 The Decision of the Labour Appeal Court (LAC)

The question that arose in *Minister of Higher Education and Training v Business Unity South Africa*[38] was whether in making and promulgating the 2012 Grant Regulations, the Minister complied with his obligation to consult the National Skills Authority? In terms of section 5(1)(i)-(v) of the Skills Development Act[39] (SDA), the National Skills Authority (the Authority) must advice the Minister on, among others, national skills development policy, strategy, and Regulation to be made. In that regard, section 7(5) provides that the Authority would need a supporting vote of at least two-thirds of its members for the purposes of advising the Minister on the Regulation to be made. Section 36 further provides that the Minister may, after consultation with the Authority, by notice in the *Gazette*, make Regulations in respect of the number of issues listed in the section, including: any procedure, period, criterion or standard for Sector Education and Training Authorities (SETA)s to perform any function in terms of section 10(1); on categories and amounts of grants that may be allocated in terms of section 10(1)*(b)*(iii); on the criteria or conditions that may be attached to grants allocated in terms of section 10(1) *(b)*(iii).[40] The argument was that the Minister substantially complied with the requirement to consult because he considered the views of some of the Authority's constituent members separately and in different fora. It was further argued that while there may not have been consultation with the Authority, its member's views were considered during the consultation process in the National Economic Development and Labour Council (NEDLAC). In effect, the individuals who represented each constituency in the Authority were to a significant degree the same individuals as those that represented that same constituency in NEDLAC.[41]

It was held that the requirements to be met by the Minister before promulgating the Regulations were unambiguously set down in the SDA. The statutorily created Authority, which the Minister was required to consult ought not to be "obfuscated with the constituencies" from which its members were elected, for, as the lower court rightly held, the Authority is a separate legal person and distinct statutory body from NEDLAC, and as section 6 shows, it has several constituencies which are not limited to business and labour with experts on skills development and provision of employment services to advise the NEDLAC. But the Minister appeared to have only consulted with business and labour in NEDLAC[42] whereas a plain reading of section 36 which provides that "the Minister may, after consultation with the National Skills Authority, by notice in the *Gazette*, make regulations", the consultation with the Authority is mandatory.

34 *Scalabrini Centre* paras 91, 93, 95 and 97.
35 *Scalabrini Centre* paras 103–104.
36 *Scalabrini Centre* paras 98, 116–118.
37 *Scalabrini Centre v Minister of Home Affairs* (2018 (4) SA 125 (SCA), paras 71 and 73
38 (2018) 39 *ILJ* 160; [2017] ZALAC 69 (1 November 2017) paras 40–42.
39 97 of 1998.
40 *Business Unity South Africa* para 44.
41 *Business Unity South Africa* paras 45–46.
42 *Business Unity South Africa* para 50.

It cannot be substituted with discussions at NEDLAC, a different body established in terms of the National Economic Development and Labour Council Act 34 of 1994, which serves a different purpose to that of the Authority. Neither could consultation in NEDLAC be used to usurp the statutory function of the Authority. To hold otherwise, according to Phatshoane AJA, would render the SDA nugatory.[43]

The LAC further held that a decision-maker is required to consider the views of interested parties before taking a decision.[44] This is supported by the Constitutional Court judgment in *Joseph v City of Johannesburg*[45] where the following passage in Cora Hoexter's *Administrative Law in South Africa*[46] was adopted:

> Procedural fairness … is concerned with giving people an opportunity to participate in the decisions that will affect them, and – crucially – a chance of influencing the outcome of those decisions. Such participation is a safeguard that not only signals respect for the dignity and worth of the participants, but is also likely to improve the quality and rationality of administrative decision-making and enhance its legitimacy.[47]

Since no meeting of the Authority was held within the required 30 days' prior notice as prescribed in section 7(3) of the SDA, the sweeping provisions of the Regulation were never subjected to a vote as required by section 7(5) hence the two-thirds support from the Authority's members necessary to advise the Minister were not obtained. It followed, therefore, that the Minister did not consult the Authority on the material changes to the 2012 Grant Regulations. Not only that the Minister did not afford the Authority the opportunity to comment on the material changes in the Regulations but also the information regarding all these was placed before the Authority two weeks after the Minister had signed the Regulations in its final form.[48] The Minister could not claim that, in any event, the Authority had no advice to give because he, the Minister is bound to exercise power according to statutory prescripts. Not only that, the exercise of public power is subject to constitutional control and constrained by the principle of legality. Accordingly, a repository of power may not exercise it or perform any function beyond that conferred upon it by law and must not misconstrue the nature and ambit of the power.[49]

It was held further that the purported consultation with the Authority on 29 and 30 November 2012 could hardly constitute adequate or genuine consultation because the Minister had already signed the final 2012 Grant Regulations. It was an insufficient compliance for purposes of section 36 read with section 5(1)*(a)*(v) of the SDA. It was correctly set aside by the court *a quo* because a mandatory and material procedure or condition prescribed by an empowering provision was not complied with, as contemplated by section 6(2)*(b)* of PAJA.[50] The court, however, conceded that in certain exceptional circumstances it may be possible for an administrator to justify affording a hearing after taking a decision, such as where an earlier hearing was not possible,[51] but:

> Section 36 of the SDA makes it plain that the Minister may make Regulations 'after consultation with the National Skills Authority' while section 5(1)*(a)*(v) provides that the Authority's function is 'to advise the Minister on … any Regulations to be made.' The phrase 'after consultation with' is well known in our law. It requires the decision to be taken in good faith with due regard to the advice given.[52] The Minister should give serious consideration to the views of the Authority but would leave him free to disagree with them.[53] In any event, according to the Minister, the purpose of the meeting of 29 and 30 November 2012 was not to consult the parties and receive their input for possible inclusion in the draft Regulations. That process was done and dusted. The meeting was convened to, *inter alia*, inform the delegates of what was contained in the Regulations that had been sent to the Minister for approval and promulgation.[54]

It is important to reflect on the reasons why the Labour Court held and the LAC affirmed, that the Minister's argument that he sufficiently complied with the statutory requirement of consultation was untenable were: first, that the constituent membership of the Authority was much broader than that of NEDLAC. Only three of the Authority's members out of 30 representatives were part of the consultation process at NEDLAC. Second, the Minister's submission that the Authority could not have formulated a unified view was mere conjecture. Third, there was no reason that the Authority could not have achieved a two-thirds majority vote in favour of a unified view.[55] Furthermore, the LAC distinguished the analogy sought to be drawn between the case in court and such cases as *Weenen Transitional Local Council v Van*

54 *Business Unity South Africa* para 57.
55 *Business Unity South Africa* para 58.

Dyk;[56] *Nokeng Tsa Taemane Local Municipality v Dinokeng Property Owners Association*;[57] and *Liebenberg NO v Bergrivier Municipality*[58] which concerned compliance by the municipalities with certain statutory provisions before imposing property rates, because none of these cases dealt with failure by the Minister to properly consult before making and promulgating subordinate legislation. The process followed by the Minister in making and promulgating 2012 Grant Regulations did not achieve the legislature's objective of the requirement that the Minister should consult the Authority since the mandatory statutory requirement to consult could not be confined or reduced to a mere sufficiency of compliance.[59]

3 CONSULTATION AT THE PROVINCIAL LEVEL

Resorting to, or the need for consultation could not have been more manifest than in a situation where the constitutionality of financial management legislation of five provinces was in issue. The Constitutional Court had held earlier in *Premier, Limpopo Province v Speaker, Limpopo Provincial Legislature*[60] that provinces lacked the authority to enact legislation dealing with their own financial management. Having declared the laws made by the provinces unconstitutional, the Court emphasised the need for consultation in *Premier, Limpopo Province v Speaker, Limpopo Provincial Legislature*.[61] There was no doubt that Parliament had the authority to enact remedial legislation but it was conceded that the intention was to call on all the parties to consult so as to develop a compromise solution. Since the background to the adoption of the provincial financial legislation showed that there has been an ongoing consultative process among the provincial legislatures for quite some time, the Court therefore allowed the parties time to consult as they agreed to do and the declarations of invalidity of the impugned Acts of the provinces were suspended for 18 months to enable them to do.

4 CONSULTATION AND PARTICIPATION IN THE LOCAL GOVERNMENT SPHERE

4 1 Municipal Law-Making Process

As it has been observed, sections 72(1)*(a),* 59(1)*(a)* and 118(1)*(a),* clearly impose a duty on the National Assembly, the National Council of Provinces (NCOP) and the provincial legislatures to facilitate public involvement in their respective legislative processes. There is no similar provision in existence in respect of local municipalities in relation to legislative processes, rather section 152(1)*(a)* of the Constitution enjoins municipal councils to "provide democratic and accountable government for local communities", and section 152(1)*(e)* requires municipal councils to "encourage the involvement of communities and community organisations in the matters of local government." The judgment of Brand JA in *Democratic Alliance v Ethekwini Municipality*[62] is authority for the proposition that, by implication, section 152(1)*(a)* required

56 2002 4 SA 653 (SCA).
57 [2011] 2 All SA 46 (SCA).
58 2013 5 SA 246 (CC).
59 *Business Unity South Africa* para 59. The Court also rejected the contention that BUSA had no standing to bring the present application when it was clear that it had done so in its own interest; in the interest of its members; and, in the public interest in terms of s 38*(d)* of the Constitution. The argument was that BUSA had no standing to raise a failure to consult in circumstances where the Authority had not raised the complaint itself. *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) paras 216–221 was cited to illustrate the proposition that only a party who had made attempts to be heard or consulted and has been rebuffed could launch a legal challenge that its procedural right has been violated. It may be recalled that *Doctors for Life* concerned the failure of the NCOP and the nine provincial legislatures to comply with the constitutional obligations in terms of s 72(1)*(a)* and s 118(1)*(a)* of the Constitution to facilitate public involvement in their processes in enacting certain legislation. In respect of the applicant's standing to approach the court for relief, the CC held that the applicant had actively sought to obtain an opportunity to be heard on the Bills both at the NCOP and in the provincial legislatures, but that their attempts which were repeated and persistent had yielded no result. The LAC held in *Business Unity South Africa* paras 60–65 that in accordance with the legal position articulated in *South African Defence and Legal Aid Fund v Minister of Justice* 1967 (1) SA 31 (C) at 34G-H and affirmed by the CC in *President of the RSA v SARFU* 2000 (1) SA 1 (CC) 168 fn. 132, BUSA had sufficient interest and the right to challenge the unlawful exercise of public power and to rely on the lack of consultation of the Authority by the Minister. "The presence or absence of consultation is a jurisdictional fact the presence or absence of which is objectively justiciable by a Court." See also *Hospital Association of SA Ltd v Minister of Health* [2011] 1 All SA 47 (GNP) para 17.
60 2011 6 SA 396 (CC).
61 2012 4 SA 58 (CC) paras 43–49.
62 2012 2 SA 151 (SCA) para 23.

municipalities to facilitate public involvement within the meaning assigned to that phrase in *Doctors for Life International v Speaker of the National Assembly.*[63] In addition, several statutory provisions exist, especially, sections 17(2) and 51(1)*(a)*of the Local Government: Municipal Systems Act[64] both of which impose an obligation on municipalities to establish appropriate mechanisms to enable local communities to participate in municipal affairs.[65] Brand JA held that the yardstick established in *Doctors for Life;*[66] and *Matatiele Municipality v President of the Republic of South Africa (Matatiele 2)*[67] for determining whether, in any given circumstance, the requirement has been met in the case of municipal council must be in line with the constitutional obligations imposed on Parliament.[68] It follows, therefore, that the inquiry is whether the council acted reasonably in facilitating public involvement in renaming certain streets, freeways and buildings within its municipal boundaries.

63 2006 6 SA 416 (CC) para 145. In its piece, "Enhancing Public Participation" ECNCOG at www.ecncoc.co.za/index.php?option=com_content&id=250:enhancing-public-par (accessed 30-07- 2017) states that s 152 of the Constitution confirms a number of citizens' rights to be involved in local government such that municipalities are obliged to encourage community involvement in local government including the way in which a municipality operates and functions. According to ECNCOG, "the principle behind public participation is that all stakeholders affected by a public authority's decision or action have a right to be consulted and contribute to such a decision." ECNCOG goes further to state that the municipality is obliged to: (a) take into account the interests and concerns of the residents when it crafts by-laws, policy and implements programmes; and (b) to communicate to the community regarding its activities. See also Rowe and Frewer "A Typology of Public Engagement Mechanisms" 2005 *Science, Technology and Human Values* 250–291 where the authors identified mechanisms of public participation/ engagement as: (a) public communication; (b) public consultation; and (c) public dialogue; Williams "Community Participation: Lessons from Post-apartheid South Africa" at www.oreconsulting.co.za/upload/docs/Publication2006-Community-Participation_SA_Lessons.JJWilliams (accessed 30-07-2017); 2006 Policy Studies 197–217; "Chapter 13 – The Public Participation Process in South African History on Line" www.sahistory.org.za/archieve/chapter-13-public-participation-process (accessed 30-07-2017).

64 32 of 2000.

65 See also ss 17(1)*(a)* and *(c);* 17(3)*(a)*(i) and (ii); 17(3)*(b)* and *(c);* 21(1)*(a);* 22*(a)* and *(b)*and 23(1) and (2), the Local Government: Municipal Finance Management Act 32 of 2003 where the steps to be taken by a mayor and council of a municipality to comply with the statutory requirements for participation by the local community when the budgeted rates of a municipality must be amended after the budget has been tabled and advertised for comment are stipulated. These provisions were in issue in *SA Property Owners Association v Johannesburg Metropolitan Municipality* 2013 (1) SA 420 (SCA) paras 32, 39–40 where the budgeted rates of a municipality had to be amended after the budget had been tabled and advertised for comment, the mayor and council of a municipality had to comply with the statutory requirements for participation in the budget process by the local community. The respondents in this case did not comply. Instead, they adopted their own truncated procedure which was not in accordance with the relevant Acts – Local Government: Municipal Property Rates Act 6 of 2004; Local Government: Municipal Finance Management Act 32 of 2003; Local Government: Municipal Systems Act 32 of 2000 – and which, in any event, was quite inadequate to ensure that the local community could participate in the preparation and approval of the budget.

66 2006 6 SA 416 (CC) paras 145–146.

67 2007 6 SA 477 (CC) paras 50–56.

68 *Ethekwini Municipality* para 24.

The inquiry thus reveals that there was "manifest unreasonableness of the public participation process adopted during phase 1", so the council's decision to change the names of the streets involved failed to satisfy the legal obligation imposed on it to engage in a reasonable public participation process. Consequently, that decision failed the legality test.[69] However, by the time of the second phase, council had amended its policy so that what it did at that stage could not be categorised as unreasonable.[70] The rationality standard did not have a high threshold, and all it required was that the impugned decision must be aimed at the achievement of a legitimate object and a rational relationship between the chosen method and that object. The standard does not require that the decision is reasonable, fair or appropriate. It is of no consequence that the object could have been achieved in a different or better way.[71] In the final analysis, "the determination of just which streets should be renamed, and what new names chosen, admits of no right answer and is inherently political … It is not for this court, or any other court, to interfere in the lawful exercise of powers by the council on that basis."[72]

4 2 Municipal Budgeting

The SCA applied the principles enunciated in *Doctors for Life* and followed in *Matatiele 2* in the subsequent case of *Kalil NO v Mangaung Metropolitan Municipality*[73] where the legality of the municipality's decision to increase rates on business property so that business property owners would pay 3.8 times as much as residential property owners was challenged. The appellants relied on *SA Property Owners Association (SAPOA) v Johannesburg Metropolitan Council*[74] for their argument that the adoption of the budget approving the increase was unlawful because the ratio between the proposed business rates and residential rates exceeded the statutory limit.[75] It was contended that the required community participation did not occur. Although that point was conceded by the municipality, the appeal was nevertheless dismissed on the community participation issue. The SCA held that whether a municipality had satisfied the requirement of public participation was a matter to be determined by the yardstick of reasonableness in the given circumstances of each particular case.[76] On the papers before court, it was held that the trial court erred in not finding in favour of the appellants on their having been no proper public participation in the municipality's budgetary process.[77] It was however correct, albeit for the wrong reasons, in not holding the proposed rate for business properties to be unlawful.[78]

As it has been mentioned, there was the earlier judgment of the SCA in *SAPOA* where it briefly summarised the statutory position with regard to the approval of a municipal budget; the imposition of rates on property; and the community's right to participate in these matters. Insofar as the SCA's 14-point statutory directives concern consultation and the local community, they include the following three important factors:

(a) The council of a municipality has the right to govern the affairs of the municipality and exercise the municipality's executive and legislative authority without improper interference. However, these rights are subject to the rights of members of the local community to contribute to the decision-making process of the municipality through mechanisms and procedures prescribed in the Local Government: Municipal Systems Act 32 of 2000 and other applicable legislation.

(b) A municipality must encourage and create conditions for the local community to participate in the affairs of the municipality, including the preparation of the budget. Accordingly, a municipality must for this purpose provide for appropriate notification and public-comment procedures. Notification to local community with regard to the budget and the imposition of rates must be done as prescribed by sections 21, 21A and 21B of the Systems Act.

(c) The public is entitled to attend meetings of a council and its committees when a budget is tabled and approved, and a resolution for the imposition of rates is adopted.[79]

The applicants, five large corporations and ratepayers in the metropolitan area and substantial consumers of services from the municipality, sought an order in *Borbet SA (Pty) Ltd v Nelson Mandela Bay Municipality*[80] to declare the municipal budget determining rates, tariffs and surcharges for the 2011/2012 financial year unlawful and of no force and effect. Their main challenge was founded on the inadequacy of the public participation process in the adoption of the budget, and the contention that the respondent had consequently failed to meet its

79 *SAPOA* para 15.

80 2014 5 SA 256 (ECP).

constitutional and statutory obligations in this regard. The respondent countered that the steps taken, which included the holding of public meetings and publication of the budget, were sufficient in the circumstances. The court examined the constitutional[81] and statutory[82] framework dealing with the process of budget approval and considered the nature and extent of the respondent's obligations to ensure public participation in the decision-making. The principles applicable in determining whether there had been compliance with such obligations were set out and the various phases in the process of preparing and adopting the budget were then assessed against this background.

Commenting on the Constitutional Court judgment in *Doctors for Life* on the issue of facilitating public participation in the law-making process, the trial judge held that facilitating public participation is even more extensive and far-reaching at the local government level than at provincial and national government levels. "This is consistent with the scheme of the different spheres of government as provided by the Constitution and is also consistent with the concept of participatory democracy that the Constitution is founded upon."[83] It was then held that in the context of local government more was required than public meetings and the publication of information. A local council is required to put in place mechanisms that create conditions for public participation and that build the capacity of communities to participate. The local council must go further to allocate resources to the task and to ensure that the political and other structures established by the legislation are employed to meet the objectives of effective public participation.[84] When consideration is given to the centrality of the budget in all efforts by a municipal council to meet the development obligations and the belated efforts made by the respondent in this instance, Goosen J ultimately concluded that the steps taken, objectively considered and viewed in their entirety, did not meet the requirements for effective public participation in the budget process.[85]

4 3 Consultation of a Managerial Nature within the Municipality

Apart from consultation in the municipal law-making or the municipal budgeting processes, there is the issue of consultation of a managerial nature that arose in the litigation in *Democratic Alliance v Kouga Municipality*.[86] It was there contended that the respondents appointed some managers without consultation contrary to the consultation requirement of section 56(1)*(a)* of the Local Government: Municipal Systems Act. The SCA held that the subparagraph of the subsection provides that the council must appoint a manager in consultation with the municipal manager to whom the appointee must be directly accountable. There was however no evidence that such consultation did not take place, while on the other hand, there was a clear indication that the municipal manager participated in the process of selecting the managers, the purpose of which was to consider the suitability of the proposed candidates. The court nonetheless pointed out that what was provided for was consultation; the requirement was not for a unanimous decision hence the ultimate power to appoint rested with the municipality.[87]

5 THE DUTY TO CONSULT IN ENGLISH LAW

The importance of the constitutionally entrenched imperative of consultation in the law-making process in South Africa's constitutional democracy has been well developed and enunciated by the courts in the last two decades. This section, therefore, considers it worthwhile to investigate whether the duty to consult exists in at least two common-law jurisdictions of England and Canada and to verify the manner in which such duty has been interpreted. While the particular duty to consult as discussed for the present context from the Canadian perspective is of constitutional vintage, that of the English emanates not from the Constitution but from statutory and common-law origins. In any event, the duty to consult in each of these jurisdictions brings into the discussion rather instructive lessons of enormous value to what consultation is and what it entails.

The duty of a public authority to consult those interested and affected, before taking a

81 *Borbet SA* paras 8–9.
82 *Borbet SA* paras 11–20.
83 *Borbet SA* para 72.
84 *Borbet SA* para 80.
85 *Borbet SA* para 82.
86 [2014] 1 All SA 281 (SCA).
87 *Kouga Municipality* paras 10–11.

decision has since been recognised in English law. Such a duty can arise in a variety of ways such as where it is created by statute. Another common source is the common-law duty of a public authority to act fairly which is often raised through the doctrine of legitimate expectation. One such example is the duty to consult the residents of a care home for the elderly before deciding whether to close it in *R v Devon County Council, ex parte Baker.*[88] Irrespective of how the duty to consult is generated, that same common-law duty of procedural fairness will inform the manner in which the consultation should be conducted.[89] In the recent UK Supreme Court's judgment in *R (on the application of Moseley) v Haringey LBC*,[90] the court was confronted with the question: when Parliament requires a local authority to consult interested persons before making a decision which would potentially affect all of its inhabitants, what are the ingredients of the requisite consultation? The Court was unanimous in answering that question by holding that a public consultation under paragraph 3(1)*(c)* of the Schedule 1A to the Local Government Finance Act, 1992 whereby the Haringey Borough Council proposed a council tax reduction scheme, was unlawful if the council did not involve inviting and considering views about possible alternatives to the scheme favoured by the local authority.

While Lord Wilson with whom Lord Kerr agreed based his judgment on the common-law source for the requirement of the duty to consult, Lord Reed, though coming to similar conclusions preferred to express his analysis of the relevant law in a way which lays less emphasis upon the common-law duty to act fairly, and more upon the statutory context and purpose of the particular duty of consultation with which the present case was concerned.[91] Lady Hale and Lord Clarke agreed with both judgments having seen little between them as to the correct approach although they agreed with Lord Reed that the court must have regard to the statutory context and that, in the particular statutory context, the duty of the local authority was to ensure public participation in the decision-making process. And, in doing so, it must act fairly by taking specific steps set out by Lord Reed.[92] According to Lord Reed, while the common-law approach which ensures procedural fairness in the treatment of persons whose legally protected interests may be adversely affected, the purpose of public consultation is to ensure public participation in the local authority decision-making process. So, if consultation were to achieve that objective, then, it must fulfil certain minimum requirements, namely: [93]

(a) Meaningful public participation in this particular decision-making process, in a context with which the general public cannot be expected to be familiar, requires consultees should be provided not only with information about the draft scheme, but also with an outline of the realistic alternatives, and an indication of the main reasons for the authority's adoption of the scheme.

(b) That follows, in the recent context, from the general obligation to let consultees know 'what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response.'[94]

88 [1995] 1 All ER 73.

89 Per Lord Wilson, *R (on the application of Moseley) v Haringey LBC* [2015] 1 All ER 495; [2014] UKSC 56 (29 October 2014) para 23.

90 [2014] UKSC 56 para 1.

91 Per Lord Reed, *Moseley v Haringey* para 34.

92 *Moseley v Haringey* para 44.

93 *Moseley v Haringey* para 38.

94 *R v North and East Devon Health Authority; Ex parte Coughlan* [2001] QB 213 para 112 per Lord Woolf MR.

Lord Wilson held that a public authority's duty to consult before making a decision could arise in a number of ways, including the common-law duty to act fairly.[95] Fairness, in the words of Lord Wilson "is a protean concept, not susceptible of much generalised enlargement." But its requirements in this context must be linked to the purposes of consultation which were highlighted in respect of the duty of procedural fairness in the determination of a person's legal rights in *R (Osborne) v Parole Board*.[96] These are: (i) the requirement of consultation is "liable to result in better decisions, by ensuring that the decision-maker receives all relevant information that is tested";[97] and (ii) it avoids the sense of "injustice" which the person who is subject of the decision will otherwise feel.[98] In adding a third purpose, Lord Wilson said:

> But underlying it is also a third purpose, reflective of the democratic principle at the heart of our society. This third purpose is particularly relevant in a case like the present, in which the question was not 'Yes or no, should we close this particular care home, this particular school etc.?' It was 'Required, as we are, to make a taxation-related scheme for application to all the inhabitants of our Borough, should we make one in the terms which we here propose?[99]

The Law Lord repeated the requirement of fairness in the consultation process set out in *R v Brent LBC, Ex parte Gunning*[100] by Hodgson J to the effect that: (a) consultation must be at a time when proposals are still at a formative stage; (b) the proposer must give sufficient reasons for any proposal in order to allow intelligent consideration and response; (c) adequate time must be given for consideration and response; and that (d) the product of consultation must be conscientiously taken into account in finalising any statutory proposal. The Court of Appeal had expressly endorsed the foregoing views of Hodgson J in their judgment in *Ex parte Baker*[101] and *Ex parte Coughlan*[102] where Lord Woolf MR had observed that:

> It has to be remembered that consultation is not litigation: the consulting authority is not required to publicise every submission it receives or (absent some statutory obligation) to disclose all its advice. Its obligation is to let those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response. The obligation, although it may be quite onerous, goes no further than this.[103]

Lord Wilson advocated for the Supreme Court's adoption of the four criteria in *Brent LBC* which has been described as "a prescription for fairness".[104] The Law Lord made two further points. First, the degree of specificity with which, in fairness, the public authority should conduct its consultation exercise may be influenced by the identity of those whom it is consulting.[105] Second, the demands of fairness are likely to be somewhat higher when an authority contemplates depriving someone of an existing benefit or advantage than when the claimant is a bare applicant for a future benefit.[106]

6 THE DUTY TO CONSULT IN THE CANADIAN CONSTITUTION

Delivering the judgment of the Supreme Court in a recent case, Karakatsanis and Brown JJ, had laid down a number of principles regarding the duty to consult enshrined in section 35(1) of the Constitution Act 1982, which protects Aboriginal and treaty rights while furthering reconciliation between indigenous peoples and the Crown.[107] The next point is that the duty to consult has both constitutional and legal dimensions.[108] Its constitutional dimension is grounded in the honour of the Crown.[109] As a legal obligation, it is based on the Crown's assumption of sovereignty over lands and resources formerly held by indigenous peoples.[110] The content of the duty, once triggered, falls along a spectrum ranging from limited to deep consultation, depending upon the strength of the Aboriginal claim, and the seriousness of the potential impact on the right. While each case must be considered individually, flexibility is required, as the depth of consultation required may change as the process advances and new information comes to light.[111] Further, the court has affirmed that it is open to legislatures to empower regulatory bodies to play a role in fulfilling the Crown's duty to consult.[112]

The issue of whether the duty to consult with the Aboriginal groups was fulfilled by the Crown was raised in the *Clyde River* case as well as in its companion case – *Chippewas of the*

109 *R v Kapp* para 6.
110 *Haida Nation v British Columbia (Minister of Forests)* [2004] 3 SCR 511 para 53.
111 *Clyde River* para 20; *Haida Nation* paras 36, 43–45.
112 *Clyde River* para 21; *Carrier Sekani* para 56; *Haida Nation* para 51.

Thames First Nation v Enbridge Pipelines Inc both of which were decided on the same day by the Supreme Court of Canada.[113] In both instances the case was against the same defendant, the National Energy Board (NEB), a federal administrative tribunal and regulatory agency, established in terms of section 3 of the National Energy Board Act, 1985 (NEB Act) whose functions include the approval and regulation of pipeline projects. The NEB Act prohibits the operation of a pipeline unless a certificate of public convenience and necessity has been issued for the project and the proponent has been given leave under Part III to open the pipeline.[114] It is the final decision-maker for issuing authorisations for activities such as exploration and drilling for the production of oil and gas in certain designated areas. Interestingly, while the court found that the duty to consult was not met in *Clyde River*, it came to an entirely different conclusion that the duty was fulfilled in *Chippewas*.

In *Clyde River*, the proponents applied to the NEB to conduct offshore seismic testing for oil and gas in Nunavut. The proposed testing could negatively affect the treaty rights of the Inuit of Clyde River, who opposed the seismic testing, alleging that the duty to consult had not been fulfilled in relation to it. The NEB granted the requested authorisation. It concluded that the proponents made sufficient efforts to consult with Aboriginal groups and that they had an adequate opportunity to participate in the NEB's process. The NEB also concluded that the testing was unlikely to cause significant adverse environmental effects. The Inuit of Clyde River applied for judicial review of the NEB's decision. The Federal Court of Appeal had held that while the duty to consult had been triggered, the Crown was entitled to rely on the NEB to undertake such consultation, and the Crown's duty to consult had been satisfied in this case by the NEB's process.[115] The Supreme Court identified the following four questions as arising for determination, namely: (a) Can an NEB approval trigger the duty to consult? (b) Can the Crown rely on the NEB's process to fulfil the duty to consult? (c) What is the NEB's role in considering Crown consultation before approval? (d) Was the consultation adequate in that case?[116]

First, it was held that the NEB's approval process, in the present case, triggered the duty to consult. The Crown's conduct which would trigger the duty to consult is not restricted to the exercise by or on behalf of the Crown of statutory powers or of the royal prerogative, nor is it limited to decisions that have an immediate impact on lands and resources.[117] The NEB is not, strictly speaking, "the Crown" or an agent of the Crown. However, it acts on behalf of the Crown when making a final decision on a project application. In this context, the NEB is the vehicle through which the Crown acts. It therefore does not matter whether the final decision-maker is Cabinet or the NEB. In either case, the decision constitutes Crown action that may trigger the duty to consult. The substance of that duty does not change when a regulatory agency holds final decision-making authority.[118]

Second, while the Crown always holds ultimate responsibility for ensuring consultation is adequate, it may rely on steps undertaken by a regulatory agency to fulfil its duty to consult. Where the regulatory process being relied upon does not achieve adequate consultation or accommodation, the Crown must take further measures. Also, where the Crown relies on the processes of a regulatory body to fulfil its duty in whole or in part, it should be made clear to affected indigenous groups that the Crown is so relying. The NEB has the procedural powers necessary to implement consultation, and the remedial powers to, where necessary, accommodate affected Aboriginal claims, or Aboriginal and treaty rights. Its process can therefore be relied on by the Crown to completely or partially fulfil the Crown's duty to consult.[119]

Third, the NEB has broad powers to hear and determine all relevant matters of fact and law, and its decisions must conform to section 35(1) of the Constitution Act, 1982. It follows that the NEB can determine whether the Crown's duty has been fulfilled. The public interest and duty to consult do not operate in conflict here. The duty to consult being a constitutional imperative, gives rise to a special public interest that supersedes other concerns typically considered by tribunals tasked with assessing the public interest. A project authorisation that breaches the constitutionally protected rights of indigenous peoples cannot serve the public interest. When affected indigenous groups have squarely raised concerns about Crown consultation with the

113 [2017] 1 SCR 1099.
114 Section 3(1), NEB Act.
115 *Hamlet of Clyde River v TSG-NOPEC Geophysical Company ASA (TGS)* 2015 FCA 179 (CanLII) (17-08-2015).
116 *Clyde River* para 18.
117 *Clyde River* paras 26–28.
118 *Clyde River* para 29.
119 *Clyde River* paras 22–23.

NEB, the latter must usually address those concerns in reasons. The degree of consideration that is appropriate will depend on the circumstances of each case. Above all, any decision affecting Aboriginal and treaty rights made on the basis of inadequate consultation will not be in compliance with the duty to consult. Where the Crown's duty to consult remains unfulfilled, the NEB must withhold project approval. Where the NEB fails to do so, its approval decision should be quashed on judicial review.[120]

Finally, while the Crown may rely on the NEB's process to fulfil its duty to consult, the consultation and accommodation efforts in this case were inadequate and fell short in several respects. To begin with, the inquiry was misdirected. The consultative inquiry was not properly into environmental effects *per se*. Rather, it inquired into the impact on the right itself. No consideration was given in the NEB's environmental assessment to the source of the Inuit's treaty rights, nor the impact of the proposed testing of these rights. In the second place, although the Crown relies on the process of the NEB as fulfilling its duty to consult, that was not made clear to the Inuit. Lastly, and most importantly, the process provided by the NEB did not fulfil the Crown's duty to conduct the deep consultation that was required here. Limited opportunities for participation and consultation were made available. There were no oral hearings and there was no participant funding. While these procedural safeguards are not always necessary, their absence in a case such as this significantly impairs the quality of meaningful consultation.[121] Furthermore, the proponents eventually responded to questions raised during the environmental assessment process in the form of practically inaccessible documents months after the questions were asked. There was no mutual understanding on the core issues – the potential impact on the treaty rights, and possible accommodations.[122] Moreover, the changes made to the project as a result of consultation were significant concessions in light of potential impairment of the Inuit's treaty rights.[123] Therefore, it was held that the Crown breached its duty to consult in respect of the proposed testing.[124]

In *Chippewas of the Thames First Nation,* the Chippewas asserted that their ancestors' lifestyle involved hunting, fishing, trapping, gathering, growing corn and squash, performing ceremonies at sacred sites, and collecting animals, plants, minerals, maple sugar and oil in their traditional territory. They asserted that they have a treaty right guaranteeing their exclusive use and enjoyment of their reserved lands, and that they have Aboriginal harvesting rights as well as the right of access and preserved sacred sites in their traditional territory. They also claimed Aboriginal title to the bed of the Thames River, its airspace, and other lands throughout their traditional territory.[125] The Court through the joint judgment of the same two Justices of the Supreme Court deliberated upon similar principles as in *Clyde River*. However, in order to minimise the volume of repetition, mention would only be made of aspects of the *Chippewas'* judgment. For instance, it was held in *Chippewas* that because the NEB's authorised work could potentially adversely affect the Chippewas' asserted Aboriginal and treaty rights, the Crown had an obligation to consult.[126] A regulatory tribunal's ability to assess the Crown's duty to consult does not depend on whether the government participated in the hearing process. The Crown's constitutional obligation does not disappear when the Crown acts to approve a project through a regulatory body such as the NEB.[127] Further, the court emphasised that the duty to consult is not the vehicle to address historical grievances. The subject of the consultation is the impact on the claimed rights at their highest, the consultation undertaken in this case was manifestly adequate.[128] Potentially affected indigenous groups were given early notice of the NEB's hearing and were invited to participate in the process. The Chippewas accepted the invitation and appeared before the NEB. They were aware that the NEB was the final decision-maker. They understood that no other Crown entity was involved in the process for the purposes of carrying out consultation. The circumstances of this case made it sufficiently clear to the Chippewas that the NEB process was intended to constitute Crown consultation and accommodation. Notwithstanding the Crown's failure to provide timely notice that it

120 *Clyde River* paras 37–42.
121 *Clyde River* paras 47 and 49.
122 *Clyde River* para 49.
123 *Clyde River* paras 50–51.
124 *Clyde River* para 53.
125 *Chippewas* paras 6–7.
126 *Chippewas* paras 29–31.
127 *Chippewas* paras 32, 34 and 44.
128 *Chippewas* paras 41–43.

intended to rely on the NEB's process to fulfil its duty to consult, its consultation obligation was met.[129] It was further held that where affected indigenous peoples have squarely raised concerns about Crown consultation, the NEB must usually provide written reasons. What is necessary is an indication that the NEB took the asserted Aboriginal and treaty rights and interests into consideration and accommodated them where appropriate. In the present case, the NEB's written reasons were sufficient to satisfy the Crown's obligation. Unlike the NEB's reasons in *Clyde River,* the discussion of Aboriginal consultation in this case was not subsumed within an environmental assessment.[130] The NEB reviewed the written and oral evidence of numerous indigenous groups and identified, in writing, the rights and interests at stake. It assessed the risks that the project posed to those rights and interests and concluded that the risks were minimal. Nonetheless, it provided written and binding conditions of accommodation to adequately address any negative impacts on the asserted rights from the approval and completion of the project.[131] Based on this, the Court felt that the consultation undertaken in this case was manifestly adequate.

From these case discussions, it is clear that even in long established jurisdictions, the need, nature and essence of consultation in the law-making and policy formulation processes is very much acknowledged and enforced by the courts. While there might be some differences in the manner in which the imperative to consult is construed, it remains an essential requirement for any democratic system based on the rule of law. These foreign jurisdictions provide a wealth of resources affirming the essence of consultation in law-making and policy formulation, and from which South African jurisprudential efforts can draw from.

7 CONCLUSION

Consultation, along with participation in the executive decision-making process and public involvement in the law-making process are part and parcel of South Africa's participatory democracy model of government and recognised as such by the Constitution. Looking through decided cases, this article has sought to use the court decisions and rationale to explain what the constitutional imperative of consultation is, the role it is meant to play in decision-making, and the ways and means through which this very important aspect of participatory democracy exerts to give rationality and legality to decisions and policy considerations. It is evident from the cases analysed in this contribution, that the requirement of consultation or public participation is a necessary one, meant to ensure that the rights and interests of all concerned are protected. And as such, ensuring a constitutional democracy that is not only participatory but also one where the rule of law thrives. As seen from the jurisprudence of the courts, failure to comply with the consultative requirement may affect the constitutionality of the action or decision of the decision-maker. Further buttressing the importance of this constitutional impressive, is the fact that this requirement is in no way peculiar to South Africa, but actually necessary for any constitutional democracy, as seen in the discussion of selected cases from the United Kingdom and Canada.

129 *Chippewas* paras 46.
130 *Chippewas* paras 63–64.
131 *Chippewas* para 64.